issue here, control the development of buildings around an airport. *Id.* at 4 (Trust App. at 58); FAA Advisory Circular 150/5190-4A (Trust App. at 72-111). *See also Flowers Mill Assocs. v. United States*, 23 Cl. Ct. 182, 187 (1991) (FAA hazard/no hazard determination made pursuant to FAR Part 77 "has no enforceable legal effect").

The Petitioners claim that the issue of federal preemption arises from two statutory schemes, the Airline Deregulation Act of 1978 and the Federal Aviation Act of 1958. However, the Airline Deregulation Act is an economic deregulation statute which is inapposite with respect to determining issues of preemption related to airline safety. *Abdullah v. American Airlines, Inc.*, 181 F.3d 363, 372 (3d Cir. 1998).

Similarly, the Petitioners rely in large measure on FAA Advisory Circular No. 150/5300-13 for its description as to what is permitted within a runway's "approach surface" or "runway protection zone". However, the standards in the Circular are merely recommendations for airports which do not receive federal aid. Advisory Circular 150/5300-13 at 3 (Petitioners' Connecticut Supreme Court Appendix at A-89). Since Goodspeed Airport does not receive federal aid, the Circular does not identify mandates for it.

The Petitioners have acknowledged that federal law does not give them the right to cut any trees on the Land Trusts' property; that limited right comes from state property law. *Ventres*, 275 Conn. at 117. The Connecticut Supreme Court has identified a prescriptive easement that is limited to maintaining a glide path to a runway with a 340 foot displaced threshold. *Id.* at 125-26. The prescriptive easement does not permit the type of clear-cutting

that is the focus of the litigation, and that was part of the basis for the findings that the Petitioners violated CEPA and the Connecticut Wetlands Act.

CONCLUSION

Based on these straightforward findings, the Connecticut Supreme Court determined that it did not have to reach the question of federal preemption. *Id.* at 132-33. Likewise, this Court should decline to exercise its jurisdiction based on the specific facts of this case.

Respectfully submitted,

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APPENDIX

SC17280 TTD	: SUPREME COURT
JAMES VENTRES ET AL.	: STATE OF CONNECTICUT
V.	:
GOODSPEED AIRPORT, LLC, ET AL.	: IN HARTFORD
	: APRIL 14, 2005

BEFORE:

CHIEF JUSTICE WILLIAM SULLIVAN
JUSTICE DAVID M. BORDEN
JUSTICE FLEMMING L. NORCOTT, JR.
JUSTICE RICHARD N. PALMER
JUSTICE PETER T. ZARELLA

APPEARANCES:

FOR THE APPELLANTS:
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FOR THE APPELLEES:
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MIKE DONNELLY, ESQ.

Joy E. Franklin
Court Monitor

* * *

[21] The case law that's cited in the brief under the Airline Deregulation Act says that the language in that act is very, the print effect is very, very broad, perhaps broader than under the Federal Aviation Act provision cited to the Court.

JUSTICE ZARELLA: On this approach slope that you're talking about, could the FAA order you to cut

down a tree that was, say, 200 feet tall, that obviously protruded into the airspace?

Could the FAA, through the DOT, order you to cut that down?

MR. BASHAW: No, the FAA cannot order you to do that under the Part 77 regulations. What the FAA can do, however, is what they will do is they'll come up, they'll identify a problem.

In fact, what Your Honor is actually getting to is a point that I'll jump to (unclear) the Trial Court's discussion of *Catchings versus Glendale* (phonetic), which basically said that these Part 77 regulations are advisory, they're not enforceable.

Now, it's true. On their face, the Part 77 Regulations do not permit the FAA or the DOT to order the airport owner to remove that tree. However, what could happen is the Connecticut DOT issues an airport a license to operate under, again, authority from the FAA.

In order to have that license and to continue to use that license and have it renewed, you need to have clear

* * *

(4)

No. 05-1088

Supreme Court, U.S.
FILED
MAR 23 2006
OFFICE OF THE CLERK

In The
Supreme Court of the United States

GOODSPEED AIRPORT, LLC, ET AL.,

Petitioners,

v.

JAMES VENTRES, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Connecticut

BRIEF IN OPPOSITION OF RESPONDENTS JAMES VENTRES AND AND THE EAST HADDAM INLAND WETLANDS AND WATERCOURSES COMMISSION

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COUNTER-STATEMENT OF QUESTION PRESENTED

Whether the Connecticut Supreme Court's decision not to address the petitioners' preemption claim, which was prompted by the petitioners' affirmative waiver at oral argument of the factual and legal basis for that claim, together with other significant gaps in the record, makes this an inappropriate case to review the claimed conflict between federal aviation law and state and local land use regulations?

LIST OF PARTIES TO THE PROCEEDINGS BELOW

The petitioners, who were the defendants below in *Ventres v. Goodspeed Airport, LLC*, 881 A.2d 937 (Conn. 2005), are: Goodspeed Airport, LLC, Timothy Mellon and Timothy Evans.

The respondents in this brief in opposition, who were the plaintiffs below in *Ventres v. Goodspeed Airport, LLC*, *supra*, are: James Ventres and the East Haddam Inland Wetlands and Watercourses Commission.

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STATEMENT OF THE CASE

The record in this case does not present any issues of grave national importance, any conflict among the various Circuit Courts of Appeal, or any pressing public policy questions that require this Court's intervention. In fact, this case involves no properly-preserved federal issues at all because the petitioners affirmatively waived the factual and legal basis for their preemption claim at oral argument before the Connecticut Supreme Court, and because many of the factual and regulatory assertions on which the petitioners rely are either misleading or simply untrue. Even the conflict that the petitioners describe between the decision of the Connecticut Supreme Court and decisions of the Ninth and Second Circuits is more fiction than fact. Therefore, this is not the appropriate case in which to attempt to resolve the hypothetical preemption and policy questions addressed at length in the petition.

The opinion of the Connecticut Supreme Court recites most of the relevant history of this case. Petitioner Timothy Mellon is the sole member of petitioner Goodspeed Airport, LLC, which owns and operates a small airport in East Haddam, Connecticut. The airport is an "[a]irport available for public use" as defined by title 14 of the Code of Federal Regulations, §77.2. Petitioner Timothy Evans is the manager of the airport and has held that position since November of 2003. (Pet. App., 3a).

Goodspeed Airport is bounded on the south by property owned by the respondent East Haddam Land Trust, which, in turn, is bounded on the south by property owned by the respondent The Nature Conservancy. The southern end of the Conservancy Property abuts a small body of water, Chapman Pond. The airport's 2100-foot runway

runs in a north-south direction and is located entirely on airport property; in fact, the southern end of the runway is over 600 feet north of the boundary line between the airport property and the Land Trust property and 1100 feet north of Chapman Pond. (Pet. App., 4a).

In late November and early December 2000, Evans, on orders from Mellon, and without the permission of the Land Trust or Conservancy, cut down every tree, bush, and other piece of woody vegetation on 2.5 acres of the Land Trust and Conservancy properties. This included the destruction of 340 trees (some that were over a century old). This wholesale deforestation took place on land located entirely within a regulated wetlands area, as defined by Conn. Gen. Stat. §22a-38(15), and that was a part of a wildlife refuge and nature preserve along the Connecticut River. (Pet. App., 4a).

The respondents in this opposition are the East Haddam Inland Wetlands and Watercourses Commission – the agency responsible for regulating activity in wetland areas in East Haddam pursuant to Connecticut's Inland Wetlands and Watercourses Act, Conn. Gen. Stat. §22a-28, et seq. – and James Ventres, the Commission's enforcement officer. (Pet. App., 1a, 5a). Following the petitioners' exercise in impromptu forest management, the respondents brought an action alleging that the petitioners had engaged in a regulated activity – clear-cutting the aforementioned hundreds of trees – within a wetlands area without first obtaining a permit, as required by the Act and East Haddam's wetlands regulations. (Pet. App., 4a-5a).

In addition to resolving a host of state law claims, the trial court rejected the petitioners' special defense of preemption. (Pet. App., 71a-74a). The trial court concluded

that federal aviation law and regulations neither expressly nor impliedly preempted state and local land use law requiring a permit prior to conducting a regulated activity in a wetlands area. (Pet. App. 72a-73a). The trial court further concluded that the state and local provisions covered different legal ground from federal aviation law, such that compliance with both was not impossible. (Pet. App., 73a-74a). In addition, the trial court found that the petitioners had a prescriptive easement *only* to *trim* trees above a certain height on the Land Trust and Conservancy properties, and that the petitioners did not have a prescriptive easement to clear-cut those trees. The trial court therefore found that, as a matter of state property law, the petitioners had far exceeded the scope of their easement when they clear-cut the 2.5 acres. (Pet. App., 68a, 86a-91a).

The petitioners did not appeal the trial court's state law easement holding, but did appeal the court's preemption holding. The respondents cross-appealed on various state law issues. (Pet. App., 3a). Prior to argument, the Connecticut Supreme Court transferred the appeal and cross-appeal from the Connecticut Appellate Court to itself pursuant to Conn. Gen. Stat. §51-199(c). (Pet. App., 3a n.4).

A clear understanding of the appellate history of the petitioners' preemption claims is crucial to the proper resolution of their petition. On appeal, both the petitioners and the respondents challenged a number of the trial court's findings and conclusions under state law. However, the petitioners did not challenge the trial court's finding

that they lacked a prescriptive easement to clear-cut[1] the trees; (Pet. App., 25a.); and they do not (indeed, they cannot) make any such claim now. In their brief to the Connecticut Supreme Court, the petitioners appeared to argue that any state property law and land use regulations affecting their right to remove obstructions within navigable airspace were preempted by federal aviation law. (Pet. App. 11a). However, at oral argument before the Court[2], petitioners' counsel, John Bashaw, affirmatively disclaimed any right to remove those obstructions (the trees) under federal law; conceded that the petitioners' right to do so was controlled by state property law governing prescriptive easements; and conceded that preemption principles had no bearing on their claimed right to go onto someone else's property and clear-cut hundreds of trees.

Attorney Bashaw's affirmative waiver was not some mere passing comment or inadvertent remark. To the contrary, Justice David Borden questioned Attorney Bashaw closely and at length about the nature and breadth of his clients' preemption claims:

> JUSTICE BORDEN: So, your argument is that your clients, that federal pre-emption is so pervasive that, basically, any state laws that impinge in any way on the right to do that [clear cutting] are simply pre-empted.
>
> MR. BASHAW: That's correct, Your Honor.

---

[1] The respondents do not claim that Connecticut's Inland Wetlands and Watercourses Act gives them the authority to regulate the trimming of trees – only the sort of clear-cutting that occurred in this case.

[2] The complete transcript of oral argument before the Connecticut Supreme Court is in the respondents' Appendix at pages 1-78.

That –

JUSTICE BORDEN: Trespass or otherwise.

MR. BASHAW: *Well, no, not true there, Your Honor.*

What our position is, Your Honor, that you do not need an order from the DOT to remove the trees. You do not need a directive from them.

If the trees protrude into the federal glide slope or if they are otherwise located in a runway protection zone *and you otherwise have the property right to remove those trees*, then you don't have to go get permission from the DOT. You do not need permission from the FAA to remove those trees. You can do it because you're trying to maintain air safety.

. . .

JUSTICE BORDEN: [Asking if, under the petitioners' view of preemption, an airport owner could "go out and bulldoze [a] house" if it impeded take-offs and landings, even in the absence of complaints by pilots or an order by the FAA.]

MR. BASHAW: *No, no, I'm not making any claim, Your Honor, that this [preemption] gives you the right to go onto somebody else's property, to go and cut down and remove their trees.*

There's a case, I think it was *City of Westchester* – it's a Connecticut decision – that dealt with abrogation [sic] easements.

I'm not making a claim that the [federal] regulations give you some sort of an easement, a right to go onto somebody else's property, but in